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LAND ADMINISTRATION AND THE RIGHT OF ACCESS TO LAND: AN ANALYSIS OF THE CONCEPT OF TEMPORARY OCCUPATION LICENSE UNDER MALAYSIAN LAND LAW

by

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Abstract

Modern problems such as globalisation, population growth, urban expansions and the ever increasing demand for land require that sustainable management of scarce natural resources, such as land becomes a necessity. Lack of good governance and proper land administration is one of the many problems endemic to developing countries. This has adverse effects not only on the proper economic and agricultural development of these countries but also in distorting equitable distribution of land thus affecting social equilibrium of these societies. Most of the countries have devised ways and means to ensure that, at least, the majority of their population have proper access to land. Some of these devices may prove successful while others have yet to test of their usefulness.

In this paper, an attempt will be made to discuss how the Malaysian Government has managed to ensure that people have access to land to satisfy their social and economic needs while it continues to own the land. This is achieved through the device of what is commonly known as 'temporary occupation license'. The paper will further attempt to discuss through case analysis, the judicial attitudes toward the nature of this device.

INTRODUCTION

The enormous fluctuations in wealth distribution, population increase, and rural/city migrations have become a constant feature of the modern societies.¹ Although both, developed and developing countries alike may experience the problem, yet these issues is possibly felt more acutely in developing countries, particularly in urban areas with constant demand for limited land resources. Thus, in order to harmonise and satisfy most, if not all, the needs over the land, more powers are taken by the state to ensure equitable distribution and proper utilisation of land resources among its citizens.² This would necessarily entail more curtailment of individual's powers to use own land the way he/she pleases. The plain lesson is that there is no such thing as 'absolute ownership' of land, in terms of unfettered and unlimited freedom, in any modern known legal systems.

In Malaysia, similar to other developing countries, the pressure over limited areas of land in the vicinities of cities, towns and even villages has created a new phenomena that requires new strategies for solving the problem. That has, in turn, led to a constant change in policies concerning not only regulating the relation of man to his land but also standardising both the relations between the government and the land on one hand and that of the government and its citizens on the other. This state of affairs necessitated a fresh legal thinking for the adminstration, control and the optimal use of land as a basic and indispensable scarce commodity.

The concept of 'land tenure' in a historical perspective

In its common legal parlance, 'land tenure' refers to a right or a term or mode of holding or occupying the land. The Malaysian courts have adopted this definition to refer to 'terms upon which a land is occupied or owned or the mode of holding or occupying land'.³ However, the conditions under which a land is held may differ considerably from one society to another depending on factors such as culture, history and whether the land is owned as a form of prestige or as a means for generating income or whether it is held as a means for

1 See Haar, Charles M, *Introduction* in Haar, Charles M (ed), 1964, *Law and Land: Anglo-American Planning Practice* Cambridge: Harvard University Press and MIT Press at vii.

2 See Simpson, SR, 1976, *Land Law and Registration*, Cambridge University Press at p 8.

3 See Suffian LP (as he then was) in *East Union (Malaya) Sdn Bhd v Government of the State*

exerting political supremacy.⁴ In whatever capacity a land is held, whether by private persons, groups or by the government authority and for whatever purposes, some sort of control and management as has been indicated above, is necessary for its proper utilisation.

The literature on the development of tenure systems in Malaysia is not wanting. Before the establishment of the British residency, the law governing tenure systems was basically that of the local customs as modified by Islamic concepts of land holding.⁵ It was customary, as reported by Maxwell, for each citizen to grab any piece of land for his own utilisation on the condition that he paid one tenth of farm produce to the Sultan or the headman (*pengulu*).⁶ The citizen would then enjoy a right of use (*usufructuary*) while the land itself was said to be owned by the Sultan. Although Maxwell's theory had later been criticised by a number of writers,⁷ it may, nevertheless, be understood 'as forming theoretical framework for the development of the modern doctrine of the state ownership of land in Malaysia'.⁸ Apparently, the notion of state ownership of the land was not new to the Muslim Malays familiar to the Islamic concept of the doctrine of vicegerency whereby the state would be regarded as the custodian of the land on behalf of the whole community. The British had aptly utilised this idea and successfully managed to entrench the concept of government ownership of the land. Not only that but 'the theoretical right to a land-tax' by the Sultan, as put by Gullick 'was made the foundation for the system of land tenure in the Malay states'.⁹

Whatever 'tenure' arrangement that was operating at that time, it apparently seemed inadequate to satisfy the needs of the colonial policies aimed

4 It is perhaps with reference to these cultural differences that the rules of English land tenure are held inapplicable to the Malaysian land matters as provided under s 6 of the Civil Law Act 1956.

5 See generally Maxwell WE, *The Law and Customs of the Malays with Reference to the Tenure of Land* (1884) 13 JSBRAS at pp 75–200. See also Das SK, 1963, *The Torrens System in Malaysia*, Malayan Law Journal: Singapore, Chapter 1; Wong DSY, 1975, *Tenure and Land Dealings in the Malay States*, Singapore University Press at pp 4, 8–13; Tan Sri Datuk Ahmad Ibrahim, *Islamic Concepts and the Land Law in Malaysia* in Ahmad Ibrahim and Judith Sihombing (ed), 1989, *The Centenary of the Torrens System in Malaysia*, Malayan Law Journal Pte Ltd at pp 189–212.

6 See generally Maxwell, *op cit*.

7 See Wong DSY, *Tenure and Land Dealings in the Malay States*, *op cit* at pp 16–20; Hunud Abia Kadouf, *The Traditional Malay Ruler and the Land: Maxwell's Theory Revisited* [1997] 1 MLJ cxxi; Gullick, (1992), *Rulers and Residents: Influence and Power in the Malay State 1870–1920*, Oxford University Press at p 138.

8 Hunud Abia Kadouf, *The Traditional Malay Ruler and the Land: Maxwell's Theory Revisited*, *op cit* at cxxix.

at the development of 'both tin-mining and export agricultural industries' necessary for enhancing 'capitalist commercial exploitation of land resources'¹⁰ in the country. In order to achieve such policies, the introduction of a new tenure structure enabling the government to collect land revenue easily and with more efficiency was inevitable.

Let us concede to the fact that the policies surrounding land tenure systems are in constant change. Although systems of land tenure may frequently lag behind, it has to continually adapt itself to the changing natural conditions, social, economic or political structures or the increase in the population size in the country. The enormous amendments to the National Land Code since its first promulgation, more than four decades ago, are a glaring witness to that fact.

The importance of the registration of titles

One of the devices adopted by most of the world legal systems for control and thus proper management of land, though not necessarily the only one, is the system of recordation or registration of titles and interests over land. A sound policy for any land tenure system is that which would be preceded by a cadastral survey of land in the country. This is in order to pave the way for the registration scheme followed by the issuance of plot-specific individual titles. The rationale, on one hand, is to clarify and confirm individual land ownership and further for facilitating easy dealing between the individual landholders. On the other hand, an overall survey of the land in a country, helps to identify and thus determine the nature and extent of the state's landholding. This state of affairs is vital for providing practical indication of the inventory or amount and quality of the land available for either revenue collection, future distribution or any other policy considerations be that for general planning purposes, whether economic or social or whether simply in order to carry out certain development programs. Therefore, the reason behind the survey and registration of specific parcels/plots of land is meant to serve both individual and public functions. As put by Simpson:

[L]and registration must clearly distinguish between its public and its private function; the former relates to the welfare of the State or community as a whole, the latter to the advantage of the individual citizen.¹¹

It is important though to mention at this juncture, that it is futile to talk about achieving any successful development programs unless due heed and a

10 Wong DSY, *Tenure and Land Dealings in the Malay States*, *op cit* at p 22.

considerable emphasis is placed on improving land use patterns and in particular, efforts regarding soil conservation. Let us admit at the outset, that the system of registration, though is essential for a good and sound land administration is not regarded as a full proof system. The fact that there is a registration system does not in itself mean that land use and development would be achieved without problems.¹²

Land tenure under the National Land Code (No 56 of 1965)

The National Land Code, with its extensive and detailed sections¹³ is considered by Simpson¹⁴ as a 'classic example' for the registration system in most Torrens jurisdictions. That is so although much of the detailed sections of the Code have apparently been dedicated to the state authority's powers of control and administration of the land.

One of the paramount features of the land tenure system in Malaysia is that all rights and interests over land are acquired, as a legal imperative, only from the state authority. Simpson has rightly mentioned that:

[T]he reform introduced by Sir William Maxwell in 1891, employed a system based on the principle that private rights in land can only derive from a State grant or from State registration of a subsequent dealing under a system or registration of title based on Torrens system.¹⁵

The rights and interests are acquired by disposal through alienation by the state authority of its land, either for periods not exceeding 99 years (a long term state lease) or by way of a grant in 'perpetuity'¹⁶ (sometimes, though inappropriately, referred to as freehold), in favour of individuals or bodies as the case may be. It should be pointed out that equity and custom are seldom resorted to as a basis for the acquisition of rights and interests in land though they may be relied upon in support of a right or interest in land that has already been established through statutory procedure.¹⁷ This policy stance is best stated by referring to the National Land Code as being a comprehensive piece of legislation as regards to acquisition and loss of rights over land particularly in West Malaysia.

12 See Simpson, SR, *Land Law and Registration*, *op cit* at p 3.

13 With 447 sections, the Code is divided into Parts and Chapters including 13 schedules and 34 forms or instruments for conveyancing or other purposes required by the Code.

14 See Simpson, SR, *Land Law and Registration*, *op cit* at p 461.

15 *Ibid* at p 209.

16 See s 76(a) and (b) of the National Land Code respectively.

17 See s 6 of the Civil Law Act 1956 (136) and 136 of the Civil Law Act 1956 (136).

Being 'a highly detailed piece of legislation',¹⁸ it should be mentioned in this connection that, the National Land Code has uniquely been structured to provide for both substantive and procedural aspects of land 'ownership'. Whether this aspect is a curse or a blessing is not a theoretical problem but should rather be answered pragmatically by land administrators and those who deal with it through practical application.

Tenure arrangements under the National Land Code must be seen as a double tier system. On one hand, it clearly sets out that the state authority is the sole proprietor¹⁹ of the whole land within the territorial area of each state. This means that the state is the only source from which titles and interests over land should be acquired. Further, the state has the sole power of regulating the relationship between the state authority and the individual citizens in land matters. On the other hand, the individual citizen is not left defunct without power or right over the land so acquired. The 'tenure system' or land ownership has been structured in such a way so as to regulate the relationship of the people to their land. It specifically provides for the power of disposition over land and the right to use the land.

It is undoubtedly true that the state authority is considered the largest landholder in the country.²⁰ Besides managing, controlling and regulating the proper utilisation of any land, it also has the power of disposal²¹ of rights and interests over its land. Let us recapitulate that two forms of disposal which are prevalent:

- (1) disposal by way of alienation under s 76; and
- (2) disposal by way other than alienation.

Conceptual differences, however, exist between these two forms of disposals. Disposal by way of alienation is meant to divest the title from the state authority and vest it in the alienee while disposal 'by way other than alienation', which involves granting short term leases over reserved land,²² issuing permits or licenses to occupy state land,²³ reserve land or mining land, is meant to create lesser interests in land while title to land continues to remain with the state authority. However, even if a person has become a registered proprietor that does not mean that his/her right or interest thus acquired is absolute in nature.

18 Simpson, SR, *Land Law and Registration*, *op cit* at pp 209 and 462.

19 See s 40 of the National Land Code.

20 *Ibid.*

21 Sections 41 and 42 of the National Land Code.

The legal nature of landholding of the registered proprietor may be differentiated qualitatively from that of a licensee, a lessee of a reserved land and/or the one who holds a permit to use state land. The difference is more discernible by reference to either the legal capacity and the extent of the enjoyment of the land by its holder or the limits of the powers of disposal that the law imposes whether on the landholder or the land occupier. A further limitation may be noted in the form of protection and enforcement of the rights of the parties in respect to the land as against third parties. This necessarily leads us to an essential question of the 'security of tenure'.

The notion of the security of tenure

The idea of land registration would invariably go hand in hand with the concept of 'ownership'/propriatorship; but to stop there is to do injustice to the whole lot of varieties of policies engulfing the registration system. It is true that in order for any system of land tenure to achieve its desired goals, (maintenance and development of land for commercial purposes etc), there must be some sort of identification and validation of an individual's rights of 'ownership' over his land. However, it should further be emphasised that 'ownership' per se would not necessarily lead to the enhancement and development of land particularly if the content of 'ownership' is rendered 'hollow' whereby the owner is left helpless without power to control and utilise his land.²⁴ The concept of 'ownership' must, therefore, be further strengthened with what is known as the 'security of tenure'. This could best be achieved by clothing the individual proprietor with a clear right or title over land whereupon the proprietor will continue to enjoy his right or interest in the land without unnecessary interference and without fear against any arbitrary displacement except through some legal process. 'Security of tenure' is, therefore, psychological as well as 'factual' in nature. It simply means that the 'owner/proprietor' of the land must experience a feeling that he is secure and safe in the *holding* of his land²⁵ without unnecessary interference (even by the government) during his/her period of enjoyment. However, the question is what are the limits of this 'security of tenure'? This is not an easy question to answer as it involves not only legal but also other factors such as policy issues relating to the social and political structure of the society.

In as much as 'security of tenure' is not synonymous to ownership, it further does not mean that such security should be unlimited in time. Having said

that, the concept of 'security of tenure' would be devoid of any meaning if the land is not held for a good period of time long enough to allow the proprietor to use the land for its proper purpose. This is indeed the rationale and the underlying policy of issuance of long term government leases amounting to 99 years under the National Land Code.²⁶ The law, as it appears, and in order to ensure this security of tenure, gives a full protection to the registered proprietor, presumably even against the state authority (as the landlord) provided that the proprietor fulfills all the conditions — express or implied — according to which the land has been disposed of.²⁷

The length of any period amounting to 'security of tenure' may vary from one case to another depending on the purpose for which the land has been allotted. Thus the security of tenure required for the cultivation of rice field (periodical crop) might not be adequate for planting permanent economic trees such as 'durian', or trees for rubber or that of palm oil trees. Indeed, if the land should be required for industrial purposes or for a building of any permanent nature, a longer period would, therefore, be necessary.

As mentioned earlier, 'security of tenure' does not necessarily require any recordation of titles or even existence of any codified rules governing tenure arrangements that is so since a person may acquire security of tenure even under systems professing customary laws such as those obtaining under most African land tenure systems. Security of tenure is, therefore, a question of fact rather than law.²⁸ However, a caveat is necessary when one talks about 'security of tenure' under the Malaysian Torrens system which, at least theoretically speaking, is still considered exclusionary in nature whereupon customary practices are exercised on a very limited scale and whereupon equitable rights and interests may not be created or transferred to third parties except through statutory procedures as specified in the Land Code.²⁹

Two sets of rights over land exist under the National Land Code, viz the right of disposition and the right to use or utilise the land. The right of

26 See s 76(a) of the National Land Code.

27 Sections 52, 76 and 114–129 of the National Land Code, inclusive.

28 Simpson, SR, *op cit* at p 9.

29 See Raja Azlan Shah CJ (Malaya) (as he then was) in *Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313 (FC), where he was categorical in pointing out: 'Squatters have no right either in law or in equity ... It does not lie in their mouths to assert that they used and occupied the land as squatters'. The court further stated that 'it cannot have been intended by Parliament in enacting the National

disposition is given to those who hold title to a piece of land. It means that the right to decide for oneself, without the influence from someone with a superior right or title, to sell, lease, lend or dispose of such land by way of will or gift. In cases of lesser interests arising from eg, temporary licenses, lease of reserved land or permits, the occupier of the land will have a right to use the land peacefully without any interference from the authorities provided that he/she fulfills all the required conditions under which the land was allocated to him/her.

THE NATURE AND DEFINITION OF 'TEMPORARY OCCUPATION LICENSE'

The institution of 'temporary occupation license' was introduced in order to solve problems of land hunger.³⁰ The definition and interpretation of 'temporary occupation license' under the National Land Code is grossly inadequate. However, some would acknowledge that the term means exactly what it is set out to describe viz that the occupation of the land is temporary and with a license to do so. It is a permission that justifies entry and doing something or carrying out something over a piece of land belonging to the state authority. It is a privilege without which entry or activity over state land would be perceived in the eyes of the law as unlawful or may be classified as tortuous. The mechanism is used in order to avoid accompanying socio-economic as well as legal problems that might culminate in acts of trespass, illegal occupation and eventual squatting. The function of a license to occupy, therefore, operates to confer 'a valid defence in respect of what would otherwise be the tort of trespass'³¹ or an offence under the National Land Code.³²

The method of case analysis is used under this section to discuss the theoretical and practical aspects of 'temporary occupation license' as obtained under the National Land Code. The Malaysian courts have invariably referred to the English common law notions of 'license' to determine the nature of 'temporary occupation license'. However, it should be remarked that the law relating to license has developed enormously under English law particularly those affecting the law of proprietary interests. According to Kevin and Susan Gray: 'In English law the 'license' to enter upon land falls towards the lower end of the calibrated scale of 'property' value which distinguishes entitlements in

30 Wong DSY, *Tenure and Land Dealings in the Malay States*, *op cit* at p 99.

respect of realty'.³³ This simply means that a 'licensee' may at one point of time claim a legally protected interest in land while under another circumstance, the licensee might not have any protection under law or equity. It should also be pointed out that there exist dual aspects of policies underlying the institution of 'temporary occupation license', both of which are practical in nature in as much as they are legal. This duality could be seen on one hand in the inherent legal right of all citizens to have access to land as their integral constitutional right similar to the rights of liberty, life and property,³⁴ and on the other hand, the willingness of the state authority to allow its citizens to fulfil their aspirations without affecting its overall right of sovereignty or the reversionary interests expectant in such land. However, it should be added that despite this inherent right of access to land, an individual citizen cannot legally sue the government to land alienated or leased to him/her.³⁵

Looking at the concept of 'temporary occupation license', in its widest historical context, it appears that the concept was developed initially by the government to introduce some sort of policy reform conducive not only for proper land use control and utilisation but also to allow individual citizens or bodies to acquire limited access to land and other natural resources without affecting or diminishing the quantum of state proprietorship over such land. The gist of the policy, as it has been pointed out, revolves around the central idea of state 'proprietorship' of land while the citizen may be afforded access to its beneficial utilisation without necessarily hampering the powers of the state over the land or any other reversionary interests thereof.³⁶ This policy stance has systematically been fortified by several judicial decisions when dealing with cases regarding 'temporary occupation license' viz that an individual citizen/body could not acquire under 'temporary occupation license' any rights over land beyond what has been conferred upon him/her by the licensing authority.

Although the advantages of the policy, one would acknowledge, might outweigh its disadvantages, nevertheless this does not mean that it has not suffered from its own shortcomings. One such serious shortcoming is that the holder lacks that sort of 'security of tenure' as a necessary incentive or motivation for proper development of the land he/she occupies. The shortage

33 Kevin Gray and Susan Francis Gray, 2001, *Elements of Land Law*, (3rd Ed), Butterworths at p 183.

34 See arts 5, 8 and *passim* of the Federal Constitution.

35 *Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1

of the time of the license in addition to some crippling conditions hardly warrants what one would term as 'security of tenure'. This, of course, depends on the nature and the type of use for which the land has been granted. Conversely, the policy proved to be useful for both the citizen and the state authority alike. It proved beneficial to citizens since it affords them speedy access to land with perhaps minimum cost in the form of a license fee only rather than having them wait, perhaps in vain, and undergo unnecessary waste of time and hope for land to be alienated to them with huge registration fees or premiums or annual rents which most of the applicants might not afford. Conversely, the policy, as an alternative mechanism for land use control, allows the state authority to regain breath and plan to absorb the soaring number of applicants queuing for land alienation for which it (the state authority) might not have the necessary funds and trained personnel or manpower to implement.

RIGHTS OF THE LICENSEE

An important legal point, however, need be clarified as regards the right of the licensee to 'occupy' land and right to 'possess' land. The court tried to differentiate between these two legal concepts in the case of *Public Prosecutor v Yap Tai (f)*, in which it mentioned that the license does not vest in the licensee any right to possess state land. The licensee, according to the court, cannot be treated similar to a tenant since the licensee does not pay rent but only a license fee.³⁷ The court was apparently referring to the common law concept of 'possession' in which mere possession may clothe the possessor with certain proprietary interest in land which certainly does not exist when a person is only a temporary occupier under a license. The only problem with this distinction is that for a possessory right to be protected, it does not need to have a basis only in tenancy.

The types of land on which the land administrator has a right to issue temporary occupation licenses are those categorised as state land, mining land and reserved land.³⁸ However, licenses would be issued only on the mining land if such land were not being used for mining purposes. Likewise, licenses would not be given over reserved land unless such land was not being used for the purposes for which it was reserved. Furthermore, it must be noted that

37 See *Public Prosecutor v Yap Tai (f)* [1947] MLJ 50 at p 51.

38 See s 65(a), (b) and (c) of the National Land Code. In the case of a mining land, the land

despite the limited categories of land earmarked for the purposes of 'temporary occupation license'; yet the license itself may be issued for a variety of purposes except for mining and the removal of forest produce.³⁹

CONDITIONS OF HOLDING TEMPORARY OCCUPATION LICENSE

The permission thus granted must be used according to any restriction laid down in the license.⁴⁰ Restrictions would normally be put on the type of user and the duration of user. These restrictions should be observed by the licensee and may be regarded as forming part of the general conditions stated by the Code. That is so notwithstanding whatever conditions that might be imposed by the state land rules. However, the conditions thus stated by the latter should not be contrary to what has been mentioned in the Code. The licensee must observe the condition that the land should be used strictly for the purpose for which it has been granted. Neither the planting of permanent economic trees nor the erection of buildings or any other permanent structures is allowed on the land. A breach of any such condition would entitle the state authority to immediate requisition or termination of the license without any compensation. However, if the licensee opts to erect buildings or grow plantations of a permanent nature, they would all become fixtures⁴¹ and would naturally be owned by the state authority.⁴² The licensee would exercise limited legal rights over them during the validity of his license but not after its determination.

DURATION OF THE TEMPORARY OCCUPATION LICENSE

A temporary occupation license when issued would come to an end by 31 December of the same calendar year on which it was issued⁴³ unless it is terminated prematurely by the state authority. In this case, the licensee may claim compensation for premature termination of his license. In this situation, the license may be treated as contractual license similar to that obtaining under the common law. Holding a license on a piece of land would not stop the state authority to exercise its powers to alienate the same land to a different person notwithstanding that such land is in fact still possessed by another on a

39 Section 42(2) of the National Land Code.

40 Section 67 of the National Land Code.

41 *Julaika Bivi v Mydin* [1961] MLJ 310; *Mohamed v Kunji Mohidin* [1967] 1 MLJ 96 (FC).

42 Section 47 of the National Land Code.

temporary occupation license.⁴⁴ That is so, since the state authority is not under a legal obligation to inform an existing holder of the 'temporary occupation license' about its future plans on not renewing the license or that it intends to alienate the same land to a different person. Hence, knowledge of a prior existence of 'temporary occupation license' over a certain piece of land would not in itself defeat the rights of a subsequent registered proprietor who obtains title from the state authority by way of alienation.⁴⁵

However, at the end of each term, the land administrator may, upon application by the licensee, renew the license for a term not exceeding one year, but is by no means under any legal obligation to do so.⁴⁶ Payment of the license fees is an important factor in determining the actual date upon which the license commences. Non-payment renders the person claiming rights under such a license, if he has already gone into possession, a trespasser. If such fees were for renewal purposes and was delayed, and if such a person had eg, a house which he had rented to a third party, then he will not be entitled to claim or recover rents from the tenant for the delayed period.⁴⁷

The number of years for which the license may be renewable should not be more than three years in total. A written consent of the state authority is required for renewals to periods beyond three years.⁴⁸ In situations where the license is coupled with a permit to extract and remove rock material, a maximum period of five years or more may be granted depending on the circumstances.⁴⁹ The reason is that it becomes impracticable to extract and remove rock material without a further positive and a simultaneous right of occupancy of the land.

LIMITATIONS ON THE RIGHTS AND POWERS OF THE LICENSE HOLDER

The holder of the temporary occupation license has no right for automatic renewal of his license. As observed by the court in the case of *Teh Bee v K Maruthamuthu*:

The holder of a temporary occupation license obtains no legal or equitable right over the land he occupies by virtue of the license other than to occupy the land

44 See *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 (FC) at p 8.

45 *Ibid.*

46 *Ibid* at p 11.

47 See *Mohamed Said v Fatimah* [1962] MII 328 at p 330.

temporarily from year to year if he can have his license renewed annually and upon such terms and conditions as may be stipulated in the license ... [T]here is no obligation on the part of the authorities to grant a renewal of a temporary occupation license for any subsequent year.⁵⁰

Since the license holder is not classified as a proprietor of the land he occupies, his right of enjoyment may fall short from similar rights exercised by a registered proprietor of an alienated land. 'A temporary occupation license is exactly what the name implies. It is a license to occupy and nothing more'.⁵¹ The court further observed, rather pointedly, in *Papoo v Veeriah* [1965] 1 MLJ 127 that:

The public, however, apparently continue to treat land held under temporary occupation license as if such a license was capable of transferring some kind of title to the holder and as if it conferred upon the holder the right to deal in land, or in things attached to the land, which comes to the same thing, as if it was land in the ownership of the license holder.⁵²

The license holder therefore, lacks the necessary legal right, no matter the length of the period of occupancy, and thus cannot enter into any dealings for transferring registrable rights and interests over such land.⁵³ A question might arise as to whether 'dealing' without transferring a registrable right or interest over land held under 'temporary occupation license' would be allowed in law. Reference should be made in this conjunction to s 68 of the National Land Code where it succinctly mentions that temporary occupation licenses are incapable of being transferred, assigned or transmitted upon the death of the holder. Therefore, dealings relating to the rights and interests over land held under temporary occupation license are neither transferable nor registrable in nature. Still the question remains: what about those dealings that normally take place between the parties outside the Code?⁵⁴ The law as it stands is clear: that such dealing should not be allowed and if it does happen, should not be enforceable.

The Federal Court was categorical in stating in *Paruvathy d/o Murugiah v Krishnan s/o Doraisamy*⁵⁵ that a 'temporary occupation license' confers only a personal right, and since the legal relationship is only between the licensee and

50 Per Ajaib Singh J in *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 (FC) at p 11.

51 Per Good J in *Papoo v Veeriah* [1965] 1 MLJ 127 (HC).

52 *Ibid* per Good J at p 127.

53 *Ibid*.

54 Cf generally per Lord Duniden in *Haji Abdul Rahman and another v Mahomed Hassan*

the licensor, the right cannot be transferred or assigned at the option of the licensee.⁵⁶ The 'license is not a right in rem which its holder can deal with as he or it pleases to the detriment of the issuing authority'.⁵⁷ A person who enters into a dealing regarding such land or any interest thereon and pays a valuable consideration would do so at his own risk.⁵⁸ A person cannot claim specific performance or sue for damages for breach of contract for sale and purchase of a house built on a land held under temporary occupation license.⁵⁹ Thus, buildings erected on a land held under temporary occupation license could not be a subject matter of private registrable transactions unless there was an agreement to the contrary to which the state authority should be a party.⁶⁰ Absence of knowledge of the existing state of affairs would not avail the purchaser of such land. The license to use or occupy the land is so personal in nature so much so that none of its benefits can be transferred neither inter vivos nor could it be inherited by the personal heirs of the deceased who dies intestate. That is so since the land and its attachments or any other benefits could not, in law, form part of the deceased's estate. The right to the license simply dies with the death of the holder.

In *Papoo v Veeriah*,⁶¹ the deceased, Vengadasalam Pillay, was a licensee who occupied a state land temporarily on which the house in question was built. He left the house to the applicant, his widow. At first, letters of administration with the will annexed were granted originally to one Thayanayagi in 1940 but was revoked in 1957 with fresh letters of administration and will, annexed given to the applicant. It appears that sometime earlier, the original administratrix had sold the house in question to the respondent. The widow in whose name the license was re-issued after the death of her husband, Vengadasalam Pillay, was then called in and surrendered the license to be re-issued in the name of the respondent who was also the purchaser of the house. The widow and the administratrix of the estate of the deceased now claim the transfer to her name, as the sole beneficiary of the deceased estate, the house built on the land. It was held that neither land (which is the subject matter of a temporary occupation license) nor anything attached to the land can be transferred or passed inter vivos or upon intestacy by will of a testator as they do not form part of the assets or the estate of the person. It thus falls in the complete discretion of the state

⁵⁶ *Ibid* at p 123.

⁵⁷ *Ibid* per Salleh Abas CJ (Malaya) (as he then was) at p 123.

⁵⁸ *Papoo v Veeriah* [1965] 1 MLJ 127 (HC).

⁵⁹ See *Ban Seng v Yap Pek Soo* [1967] 2 MLJ 156 at p 157; *Hee Cheng v Krishnan* [1955] MLJ 103 (HC).

authority to re-issue or refuse to re-issue fresh license over the said land to a legatee or a next-of-kin. The exercise of this discretionary power is by all means absolute.

Similarly in *Fatimah v Moideen Kutty*,⁶² the respondent rented and occupied two shop houses on the land originally held by the deceased, husband of the appellant, on a temporary occupation license until he died sometime in August 1962. Although the collector renewed the license for the year 1963 in the name of the deceased person, he, nevertheless, refused a further renewal after the end of 1963 upon discovery that the license holder had since been deceased. The appellant as administratrix claimed rent arrears for periods of 1964 and 1965. It was held that upon the death of the licensee, neither his widow nor his estate had a right of any kind whatsoever to the land.⁶³ It was further held that since the land had never formed part of the deceased's assets, neither his estate nor his widow had a right of claim to the land during the material periods of 1964 and 1965. A tenant though he is in an illegal occupation of the land, might successfully raise the defense of estoppel⁶⁴ and thus refuse payment of rent upon discovering that the title to land was no longer vested in the landlord notwithstanding any previous payments or title acknowledgement. McIntyre FJ further amplified the law:

The law being such, it must be assumed that every contract of tenancy in respect of a house on state land contains an implied term that the tenancy is valid only for the duration of the landlord's license to occupy the land. On the expiration of the landlord's license, either by effluxion of time or by the death of the licensee, the contract of tenancy must be deemed to have come to an end and the relationship of landlord and tenant, extinguished.⁶⁵

On the other hand, a licensee should not be confused with a tenant. If the licensee chooses to over stay on the state land either because his license has expired, or has intentionally been determined or because such license was never acquired in the first place, such a person would appropriately be classified as being in 'unlawful or illegal possession' of the state land.⁶⁶

Rights of the license holder

It has been mentioned above that the right of the temporary occupation license holder is hardly similar to that of the common law right in which the mere

⁶² [1969] 1 MLJ 72 (FC).

⁶³ *Ibid.*

⁶⁴ *Ibid.* See also s 116 of the Evidence Ordinance 1950.

possession per se would be protected even against the original proprietor. The right of the holder emanates only from the license given to him by the state authority in absence of which the person would be declared as either a trespasser, squatter or illegal occupier. However, this is not to say that the holder of the license is not protected by law against any unlawful interference with his peaceful enjoyment of possession against any third party. Indeed, the license holder would be protected even against the state authority by payment of compensation if the latter opts to terminate the license prematurely before the end of the prescribed period.⁶⁷ When the state authority chooses to do so, common law principles requiring service of a valid notice with a reasonable time to vacate must apply. It was held in *Cheo Lean How v Fock Fong Looi*⁶⁸ that 'a licensee whose license is revocable is entitled to reasonable notice of revocation'.⁶⁹ The court continued to state that:

Like Viscount Simonds and Lord Cohen, we would adopt the law as stated by Goddard LJ in the *Bellotti* case as being applicable to the facts of this case. It is conceded that there is no written law in Malaysia dealing with this subject and in the event of a conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail (see s 3(2) of the Civil Law Act 1956 (revised 1972 as Laws of Malaysia Act 67)).⁷⁰

The common law principle that a reasonable time should be given within which the determination of the license takes effect, seems to apply equally to the state authority as it operates against anybody intending to eject a licensee, holding land or any interest therein under a revocable license. In *Public Prosecutor v Yap Tai (f)*,⁷¹ the respondent was a holder of a temporary occupation license of an area of state land in Kuala Lumpur whereupon she built a house and stayed there for several years. The land was required for a site for government workshops and a valid notice was served requiring her to vacate the land and demolish the house within 90 days. The respondent refused to

67 See *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 (FC) at p 11.

68 [1985] 2 MLJ 440 (SC).

69 *Cheo Lean How v Fock Fong Looi* [1985] 2 MLJ 440 (SC) at p 444. See also *ibid* in the same case where Seah SCJ quotes Blackburn J as having stated in *Mellor v Watkins* (1874) LR 9 QB at p 400 that a person giving a revocable license 'is bound to give the licensee reasonable notice'.

70 Per Seah SCJ in *Cheo Lean How v Fock Fong Loo* [1985] 2 MLJ 440 (SC) at p 445. In *Minister of Health v Bellotti*; *Minister of Health v Holliday* [1944] 1 All ER 238 at p 245, Lord Goddard (as quoted in the *Cheo Lean*'s case at p 444) stated in the Court of Appeal that: 'If a licensor determines a license, he is bound to give a reasonable time within which the determination is to take effect, so that the licensee can collect himself, his property ...

comply with the notice to vacate and continued to occupy on the land. The court held that although respondent was no more than a trespasser, nevertheless, she would be entitled not only to a reasonable notice but also '... to a reasonable time in which to remove what she has placed on the land ... the 90 days given was ... reasonable'.⁷² Spencer-Wilkinson J further explained as follows:

The notion that those occupiers who have been in occupation of the same plot of land for a very long period of years under licenses which have renewed year by year have acquired any right to further renewal or any exemption from revocation during the currency of the license is one which in my opinion, is completely disposed of by s 17 of the Land Code. There is a natural tendency on part of the occupiers of premises on a temporary basis for their sense of insecurity to diminish by the passage of time. It is well, therefore, that it should be made clear to those concerned that *temporary* occupation of state land is no more than its name implies.⁷³

An important point to be made is that a temporary occupation license can never mature through extended duration or time into an interest over land comparable to that of proprietary right. Furthermore, the fact that the time given for vacating the premises was unreasonable does not in itself put an end to the withdrawal of the license from the occupier if the grantor so desires.⁷⁴ In any case, the licensee would not be entitled to the right of compensation against a subsequent grantee of the license or any subsequent registered proprietor to whom the same land has been alienated by the state authority.⁷⁵

Most of the rights available to the proprietor of the alienated land under s 44(1) of the National Land Code are also available to the license holder though on a somewhat limited scale. It is true that s 68 of the National Land Code prohibits acts of transfer, assignment and transmission of the temporary occupation license; but other than that, it does not prohibit the giving of permission to use the rights under it.⁷⁶ Thus, a holder of a temporary occupation license has a right to eject another, notwithstanding that the latter was in possession before the temporary occupation license was issued. It is in

⁷² Per Spencer-Wilkinson J in *Public Prosecutor v Yap Tai (f)* [1947] MLJ 50 at p 54.

⁷³ *Ibid* at pp 54–55.

⁷⁴ *Minister of Health v Bellotti; Minister of Health v Holliday* [1944] 1 All ER 238 at p 245.

effect 'a qualified form of title' whereupon the holder is empowered with 'the right to exclude others'.⁷⁷ In *Mohamed Said v Fatimah*,⁷⁸ the court observed that:

During the period for which the license is valid, the licensee has a right to immediate and exclusive possession to the land. It is a well established law that an action for trespass is maintainable not only at the suit of him who is in possession of the land but also, using the word 'possession' in its strict sense, at the suit of a person entitled to immediate and exclusive possession ...⁷⁹

This is one of the few cases in which the court tried to underline the precise juridical nature of the licensee's right in law or equity in relation to the land he/she occupies. It is true that the occupier may lack what is known as 'security of tenure'; but this is not to say that she/he lacks the legal or equitable protection of his entitlements while he is still in occupation before the end of the prescribed period or before the license has been revoked.

In *Julaika Bivi v Mydin*,⁸⁰ the plaintiff contended that she was granted a temporary occupation license of a land previously held by another person who had erected a house on it. the defendant occupied and used part of the house by the consent of the previous license holder and continued to do so even after the license had been surrendered and later reissued it in the name of the plaintiff. When served with a notice to quit, the defendant refused to do so and further resisted a claim for eviction brought by the plaintiff in trespass. The main defence was that the plaintiff being herself, a licensee was not entitled to bring an action on trespass at her capacity, since as a mere license holder, she lacks the necessary title to exclude or prevent others to enter the land. The court held that 'an action for ejectment in tort lie at the instance of a holder of a temporary occupation license against a trespasser'.⁸¹ A distinction must be made, as mentioned above, between a person who is properly in possession and refuses to come out and a tenant holding over at the expiration of the term of tenancy.⁸² A possessor of the land cannot be adjudged trespasser as against the original holder but could become so in relation to a subsequent holder of the temporary occupation license.

77 Per Neal J in *Julaika Bivi v Mydin* [1961] MLJ 310 at p 311. See also *Mohamed Said v Fatimah* [1962] MLJ 328 at p 329 where Adams J stated that the '... license ... must confer upon the licensee the exclusive right to occupy the land in respect to which the license is issued to the exclusion to anyone else'.

78 [1962] MLJ 328.

79 *Ibid* at p 329.

80 [1961] MLJ 310 (High Court, Ipoh).

A person who holds a piece of land under temporary occupation license, although may lack legal capacity to enter into dealings or transactions for creating rights or benefits over the land may nevertheless rent part of a house built on such land to another third party.⁸³ If the occupier serves a notice on the tenant to quit, then it is not for the tenant to deny the licensee's title or refuse delivering vacant possession of the premises otherwise he will be declared a trespasser.⁸⁴ This is a clear situation of tenancy by estoppel,⁸⁵ and the tenant could not be heard to plead that the tenancy was void for illegality. He could not under the circumstances be protected by the then Control of Rent Ordinance 1956. 'It is elementary law that no title need be shown at all when the tenant is estopped from denying the title of his landlord'.⁸⁶ The state of affairs perhaps requires that the licensee must not only prove that his license was valid but also that he was either in actual possession or has the right for an immediate possession of the land at all material times. Renting a house built on a state land held under the temporary occupation license is not, therefore, tantamount to the transfer of the license. In *Paruvathy d/o Murugiah v Krishnan s/o Doraisamy*,⁸⁷ the court refused the argument of the counsel calling for the non-applicability of the equitable estoppel in 'temporary occupation license' cases and proceeded by holding that in invoking this equitable principle, it is not necessary that legal estate should be proved.⁸⁸ That is so since:

The principle is an equitable principle created for the protection of a person who has expended money because of his reliance upon the encouragement of the other. It is because of the expenditure incurred on account of such expectation

83 *Govindaraju v Krishnan* [1962] MLJ 334; *Ban Seng v Yap Pek Soo* [1967] 2 MLJ 156.

84 See *Govindaraju v Krishnan*, *ibid.*

85 See s 166 of the Evidence Ordinance and the case of *Paruvathy d/o Murugiah v Krishnan s/o Doraisamy* [1983] 2 MLJ 121 (FC).

86 Per Ismail Khan J in *Govindaraju v Krishnan* [1962] MLJ 334 at p 335; see also *Ban Seng v Yap Pek Soo* [1967] 2 MLJ 156, where Gill J stated at p 157: 'Where a tenant has been paying rent for so many years, he is estopped under s 116 of the Evidence Ordinance 1950 from denying the title of his landlord, and when a tenant is estopped from denying a title, no title need be shown at all. The most ordinary instance of estoppel is the well established rule that a tenant, during his possession of premises, shall not deny that the landlord, under whom he had entered and to whom he has paid rent, had title at the time of his admission. Thus, whether the landlord brings ejectment, or an action for rent or for use and occupation against his tenant, the defendant can neither set up the superior title of the third person, nor show that the landlord has no title. The fact that the plaintiff had no temporary occupation license at the beginning of the tenancy or at any time subsequently, therefore, was no bar to this action.'

and encouragement that the parties are brought into a legal relationship. The principle therefore arises in order to govern that relationship irrespective of what interest in the precise legal term each of them has.⁸⁹

The equitable doctrine of 'proprietary estoppel' where elements of 'encouragement' and 'expectation' were shown would be taken as determinant factors in establishing the legal relation between the parties to the transaction under 'temporary occupation license'. It should further be remarked that ejectment does not lie only at the instance of a person who has title over land but also in favour of a holder of a license or any person who is entitled to *profits a prendre*⁹⁰ as they could also sue to prevent others from interference with their peaceful enjoyment of the land or any profits that accrues there from. In *Mohamed v Kunji Mohidin*,⁹¹ both the plaintiff and defendant were holders of temporary occupation licenses over the same plot of land though for different purposes. The plaintiff had a right to occupy the land and pluck coconuts from trees on the land. The defendant, on the other hand, had the license to rear poultry. It transpired that the defendant had entered and cut a variety of fruit trees including some trees from which the plaintiff used to collect coconuts. The plaintiff sued and was awarded \$2,000 in damages. On appeal, it was held by Barakbah LP, that since the respondent was not the owner of the trees, he could not claim damages for their loss but only damages 'for the loss of income from the coconut trees as the license was to pluck coconuts only'.⁹²

CONCLUDING SUMMARY

The notion of access to land is closely tied up not only to the general question of affording the majority of the citizens the capability to acquire and use land but also to the central question of poverty alleviation particularly among the most disadvantaged of the society.

The case analysis shows that there are no apparent gender discriminations between male and female applicants. Women too, can hold temporary occupation licenses in their own right as heads of individual family groups. It is apparent though that in order to understand the legal basis as well as the

89 *Ibid* per Salleh Abas CJ (Malaya) at p 123.

90 *Mason and another v Clarke* [1955] AC 778 (HL). In this case, the appellant obtained an oral agreement to catch rabbits on another's estate. The House of Lords held that although the right amounted only to a *profit a prendre*, the plaintiff could still recover damages from a person who interferes with the exercise of such right. See *Mohamed v Kunji Mohidin* [1967] 1 MLJ 96 (FC).

political initiatives for the introduction of temporary occupation licenses, one has to look at the overall governmental land control and management policies. The purpose of the government policy for devising the mechanism for allocating temporary occupation licenses is utilitarian in nature since it apparently aims at allowing the greatest number of citizens to have access to land as a means for alleviating land hunger.

The author admits to certain shortcomings in the methods of enquiry, particularly those relating to empirical data, which would have been necessary under the circumstances. In order to have a full socio-economic impact analysis of the importance of 'temporary occupation license' exercises as an appropriate mechanism, for not only proper land control and administration; but also as a vehicle for the access of land, a full survey method should be carried out in which statistical data should be collected so as to determine questions such as, who actually applies for 'temporary occupation license', the gender of applicants and the percentage of successful applicants. This is in order to help the policy makers not only to find the most appropriate criteria for awarding the licenses but also to determine the success or failure of the system and furthermore to help devise or suggest reforms to substantive and procedural requirements. Answering these questions may appear crucial in order to determine the success or failure of the system for alleviating the problem of access to land to the majority of the people. Such a method would help the policy maker to determine whether the 'temporary occupation licenses' institution should be maintained or abolished.